



**Before The
State Of Wisconsin
DIVISION OF HEARINGS AND APPEALS**

Application of Paul Stitt for an After-the-Fact
Permit to Grade in Excess of 10,000 Square Feet
Adjacent to Lake Michigan, Town of Manitowoc,
Manitowoc County, Wisconsin

Case No.: 3-NE-99-104LL

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

Mr. Paul Stitt, 123 Cleveland Avenue, Manitowoc, Wisconsin 54220, completed filing an application with the Department of Natural Resources for an after-the-fact permit to grade in excess of 10,000 square feet on the bank of Lake Michigan. The project is located in the Town of Manitowoc, Manitowoc County, in Government Lot 2, Section 18, Township 18 North, Range 24 East.

The Department of Natural Resources issued a Notice of Proposed Grading which stated that unless written objection was made within 30 days of publication of the Notice, the Department may issue a decision without a hearing. The Department received an objection from the Manitowoc County Board of Adjustment, c/o Orville Bonde, Chairperson, 4319 Expo Drive, P. O. Box 610, Manitowoc, WI 54221-0610; and Leon H. and Donna M. Floerchinger, 5421 South 10th Street, Manitowoc, WI 54220.

On October 25, 2000, the Department filed a Request for Hearing with the Division of Hearings and Appeals.

Pursuant to due notice hearing was held on December 4, 2000, at Manitowoc, Wisconsin, before Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. A subsequent, ex-parte filing was received and forwarded to all known parties on December 6, 2000.

In accordance with §§ 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

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FINDINGS OF FACT

1. Mr. Paul Stitt, 123 Cleveland Avenue, Manitowoc, Wisconsin, 54220, completed filing an application with the Department for a permit under § 30.19, Stats., to grade in excess of 10,000 square feet adjacent to Lake Michigan, Town of Manitowoc, Manitowoc County. The Department and the applicant have fulfilled all procedural requirements of §§ 30.19 and 30.02, Stats.

2. The applicant owns real property located in the Town of Manitowoc, Government Lot 2 in Section 18, Township 18 North, Range 24 East, Manitowoc County. The above-described property abuts Lake Michigan which is navigable in fact at the project site.

3. The permit application has two components: request for an after-the-fact permit for a large area of previous grading, well in excess of 10,000 square feet; and a proposal to grade an additional area in excess of 10,000 square feet adjacent to Lake Michigan.

Paul Steinbrecher, a registered professional engineer working for the applicant, testified relating to both the previous and the proposed additional grading. (Ex. 3) Approximately 29,000 square feet of grading has been undertaken without the required permit. Of this, approximately 9,600 square feet were graded on the Stitt property and more

than 19,400 square feet on the adjacent property owned by Gary and Gloria Yealon. The Yealons were aware of and approved the Stitt's grading plans prior to Stitt's undertaking the grading. Neither the Stitts nor the Yealons have built a home at the site, although the Stitts intend to build a circular dome home in the near future.

The proposed additional grading consists of 8,400 square feet on the Stitt property and an additional 9,400 square feet on the Yealon parcel (Steinbrecher). The proposed grading would involve elimination of the remaining steep bluff and replacing it with a more gradual 3 to 1 slope.

4. The purpose of the previous, after-the-fact grading was to allow for easier lake access and to improve the applicant's view of the lake. (Stitt) The purpose of the proposed additional grading is to stabilize the existing embankment.

5. In September of 1998, the applicant applied to grade, fill and excavate 7,000 square feet at the above-described project site. Because the proposal was represented as involving less than 10,000 square feet, the DNR advised Stitt that he did not need a permit. (Ex. 12)

6. Stitt subsequently undertook grading well in excess of 10,000 square feet.

7. On October 9, 1998, Stitt was issued a citation by the DNR for grading without a permit. On February 17, 1999, Stitt paid a forfeiture totaling \$455.00.

8. Mr. Stitt admits that his original grading plan was ill conceived. One result of the grading was significant ponding, on both the Stitt property and the adjacent lot, owned by the Yealons. A pit approximately 40 feet wide and 115 feet long was created. The pit holds water 3 to 6 feet in depth. Another result was to shear away the bluff along the shoreline. The bluff height from the ordinary high water mark was 42 feet at the south end and 46 feet at the Yealon lot line. Somewhere between 6 and 14 feet of the bluff top has been lost. (Steinbrecher; Duperrault) The proposed grading would reduce it still further, to produce a gentle slope of 3 to 1 down to a level just two feet above the ordinary high water mark. (OHWM)

The grading has also contributed to serious erosion and seepage problems that have damaged water quality and which threaten the stability of the bluff embankment across the face of the Stitt and Yealon parcels. There are several seep line areas where the groundwater intersects the bluff and sits on the face of the bluff. The most significant seep line is 2 ½ to 6 ½ feet below the existing ponded area on the Stitt and Yealon properties. (Steinbrecher; Ex. 3).

9. The bluff bank in its present state constitutes a danger because erosion and seepage lines threaten the structural integrity of the steep bank. (Steinbrecher; Duperrault) The grading undertaken by the applicant has stripped the bluff face of natural vegetation, has exposed seepage lines, and created the ponding which poses a serious risk that the bank will slump and fall into the lake.

10. The applicant and the DNR both presented unrebutted engineering testimony that it would be practically impossible to restore the bluff to its undisturbed state prior to the unauthorized grading undertaken by Stitt. Steinbrecher testified that natural soil compaction, slowly accomplished over thousands of years, is much more effective than mechanical compaction. Further, mechanical compaction might well jar unstable areas and lead to a collapse of the remaining bank. (Id.) However, the applicant's engineer testified that if the grading were undertaken to the bottom of the existing pond, rather than grading the 3 to 1 slope all the way down to the OHWM, the bank "would have the same stability as the adjacent, undisturbed slopes." (Steinbrecher)

11. The proposed grading plan would likely be adequate to protect the public waters and neighboring properties from erosion. The proposed plan involves the placement of round armor stone two feet above the OHWM elevation to protect the "toe" of the excavated area from wave action erosion. (Ex. 3, Steinbrecher) This toe protection involves placement of the stone at a 3 to 1 slope over a filter fabric and gravel or small rock. (Id.)

Further, the applicant proposes placement of 4-inch diameter pre-cast concrete manholes, with so-called beehive casting. The tile drainage system employing four such manhole tiles would attempt to collect surface water drainage and drain to a single pipe outfall. (See: Ex. 3) There is a drop-off 54 feet from the maximum height to the discharge elevation just above the OHWM. (Steinbrecher) The manhole tiles are expected to capture the groundwater that is causing the seepage described in Finding #8 above. The banks will be stabilized with the use of concrete pipe anchors from the top to the bottom of the slope, placed at 3-foot intervals.

The proposed plan involves application of Wisconsin Construction Site Best Management practices, including placement of erosion mats and hay bales during grading. Finally, to protect the neighboring properties, the applicant proposes employment of erosion control best practices and grading to reduce the steepness to a 5 to 1 slope.

12. The applicant also intends to control further erosion with a planting plan. (Ex. 4) However, the present vegetation plan is vague and incomplete and relies upon plants that are not native to the area nor appropriate to the site. (Duperrault) The current plan relies heavily upon crown vetch, which would not be a good choice for the steep bank. Some version of the vegetation plan, specifically to include greater reliance on native grasses, is necessary to protect the public interest in preventing erosion and maintaining natural vegetation.

13. Approval of the proposed project would be detrimental to the public interest in maintaining natural scenic beauty and in protecting the physical integrity of natural features abutting public waters. (Duperrault; Aasen, et al.) Numerous witnesses testified that they preferred the natural scenic beauty of what Ms. Gorder described as the steep "mud cliffs" to a less natural gentle slope. (Duperrault, Gorder, Aasen, Leahy, Mayer, et al.) The steep bluffs have made lake access more difficult, and have contributed to maintenance of a natural-appearing shoreline. Further, there is a limited area of shoreline, less than one mile

long, where the steep clay banks are present. Numerous witnesses testified that the clay banks were a unique and valuable natural resource.

14. Balancing the rights of the public in maintaining natural features along public waterways with the rights of the applicant, it is appropriate that the applicant be allowed to grade no more of the steep bluff than is necessary to stabilize the bank and prevent its collapse into Lake Michigan. The un-rebutted engineering testimony was that it would be possible to stabilize the bluff by grading no further than the bottom of the ponded area. The instant application exceeds what is necessary to achieve stabilization of the bank, and must be denied.

15. The Department of Natural Resources has complied with the procedural requirements of § 1.11, Stats., and Chapter NR 150, Wis. Admin. Code, regarding assessment of environmental impact.

DISCUSSION

This is, in several ways, a very troubling case. The applicant has created a situation where there is no good resolution of this case. If the permit is granted, the applicant will have obtained through extra-legal means what he could not have gained lawfully. As Ms. Duperrault testified, this permit application would not have been granted in the first instance, due to concerns about natural scenic beauty, erosion and loss of wildlife habitat. However, a failure to grant this permit may pose a safety hazard, because the applicant's grading has threatened the very stability of the bluff.

The applicant has employed a first-rate engineer to undertake additional grading. Mr. Steinbrecher candidly admitted that it would be possible to stabilize the bluff by grading landward to the level of the bottom of the ponded area. (See: Ex. 10) The Department's concerns about collapse of the remaining bank would be addressed by grading to the level of the bottom of the existing pit on the Stitt and Yealon properties.

Consideration of the public interest in public waters is largely about balancing the rights of riparians with the rights of members of the public. In the instant case, the balancing indicates that, in this unique circumstance, grading should be allowed only in so far as it is necessary to stabilize the bluff embankment. There is no question that many other riparians would like to destroy steep banks that hinder their view and/or access to the lake. Mr. Yealon acknowledged that his unbuilt parcel next to Mr. Stitt's was not as desirable as the lakefront parcel on which he built his residence because of the difficulty in obtaining lake access. To allow the applicant to dramatically improve the value of his lot by unlawfully undertaking grading which undermines the stability of the bluff would threaten public rights in public waters because it would encourage others to unlawfully destroy steep natural areas to improve lake views or lake access. If numerous riparians sought to re-grade steep banks, the detrimental cumulative impacts to natural scenic beauty and to the fundamental physical integrity of natural features of public waters would be staggering.

While it may have been possible to modify the instant application to allow for grading on this limited basis, the Division finds that it is more appropriate to deny the instant application and have the applicant submit a revised plan. This is for several reasons. First, the public has demonstrated a keen interest in this project and in protecting natural features along Lake Michigan. Any further proposal should include further public input. Similarly, neighboring riparians should be involved in any revised plans. Second, the applicant's vegetation erosion-control plan is currently incomplete and not acceptable to the DNR. It would defeat the central purposes of the public hearing process to grant a permit with two fundamental parts of the project still in the design phase. Accordingly, the instant permit applicant must be denied. It is hoped that the applicant will quickly submit a modified application that provides for preservation of the bluff to an elevation approximating the bottom of the ponded pit area, as soon as possible.

CONCLUSIONS OF LAW

1. The Division of Hearings and Appeals has authority pursuant to §§ 30.19 and 227.43(1)(b), Stats., to approve or deny applications for permits to grade in excess of 10,000 square feet adjacent to the banks of navigable waters of the state.

2. The proposed grading will injure public rights or interest in Lake Michigan, specifically the project will result in both direct and cumulative impacts to the public interest in protecting and preserving natural features and natural scenic beauty. As a result, the proposed grading does not meet the standards set forth in § 30.19(4), Stats.

3. The proposed grading will not cause environmental pollution as defined in § 229.01(4), Stats., and will result in no material injury to the rights of any neighboring riparian owners. The project as proposed conforms to the requirements of laws for the platting of land and for sanitation.

4. In considering Chapter 30 water regulation permit requests, the DNR must consider the cumulative impacts of numerous small projects which are detrimental to the public interest incrementally. Sterlingworth Condo Assn. V. DNR, 205 Wis. 2d 710, 556 N.W.2d 791 (Wis. Ct. App. 1996).

5. A project may be determined to be "detrimental to the public interest" on the ground that it impairs natural beauty. This is a proper basis for denial of a permit. Clafin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973). The proposed project would be detrimental to the public interest in natural scenic beauty.

6. An applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the statutory standards. Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, 412 N.W.2d 505 (Wis. Ct. App. 1987). The applicant has not carried its burden of showing that the proposed project would not be detrimental to the public rights or interest in Lake Michigan.

ORDER

WHEREFORE IT IS HEREBY ORDERED, that the application for a grading permit be, DENIED.

IT IS FURTHER ORDERED, that the applicant submit plans acceptable to the Department to regrade to the level of the bottom of the ponded area and that any such grading permit include the conditions set forth in Exhibit 24 (attached) and a revised vegetation planting plan.

Dated at Madison, Wisconsin on January 12, 2001.

STATE OF WISCONSIN
DIVISION OF HEARINGS AND APPEALS
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By: _____
Jeffrey D. Boldt
Administrative Law Judge

NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.